

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Robert Hertzberger,

Case No. 22-cv-0756 (WMW/TNL)

Petitioner,

**ORDER ADOPTING REPORT AND
RECOMMENDATION OF
MAGISTRATE JUDGE**

v.

Jarid Rardin,
*Warden; Rochester Federal Medical
Center*

Respondent.

This matter is before the Court on the Report and Recommendation (“R&R”) issued by United States Magistrate Judge Tony N. Leung on March 23, 2023. (Dkt. 16.) Petitioner Robert Hertzberger objects to the R&R, (Dkt. 17), and Respondent Jarid Rardin filed a reply to Hertzberger’s objection. (Dkt. 18.) For the reasons addressed below, the Court overrules Hertzberger’s objection, adopts the R&R, denies the petition and dismisses the action without prejudice.

BACKGROUND¹

Hertzberger was convicted of distribution of oxycontin resulting in death, a violation of 21 U.S.C. § 841. The United States District Court for the Southern District of Indiana sentenced Hertzberger to 360 months’ imprisonment. In early 2022, the Bureau of Prisons denied Hertzberger’s request to be placed in home confinement. Following the denial, Hertzberger commenced this action, seeking “a Declaratory Judgment that his

¹ The R&R, (Dkt. 16), provides a complete account of the relevant facts.

offense is not excluded [from home-confinement eligibility] and an Advisory Opinion that he is entitled to such benefits.”

ANALYSIS

The Court reviews *de novo* the portions of an R&R to which a party has objected and “may accept, reject, or modify, in whole or in part, the findings or recommendation made by the magistrate judge.” 28 U.S.C. § 636(b)(1); D. Minn. LR 72.2(b)(3). A party’s objections to an R&R must “specify the portions of the magistrate judge’s report and recommendation to which objections are made and provide a basis for those objections.” *Mayer v. Walvatne*, No. 07-cv-1958, 2008 WL 4527774 at *2 (D. Minn. Sept. 28, 2008). An objection that restates arguments made to and considered by the magistrate judge is reviewed for clear error. *Montgomery v. Compass Airlines, LLC*, 98 F.Supp.3d 1012, 1017 (D. Minn. 2015). In the absence of specific objections, the Court reviews an R&R for clear error. *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996). Because Hertzberger is self-represented, the Court liberally interprets his objections. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Horsey v. Asher*, 741 F.2d 209, 211 n.3 (8th Cir. 1984).

Hertzberger’s objection is that it is his “impression that the Court may have misunderstood the true nature” of his request for relief. Hertzberger, therefore, asks the Court to clarify to the Bureau of Prisons whether his offense is considered a crime of violence. Upon a review of the record, Hertzberger presented this argument to the magistrate judge, and the R&R rejected the argument. Because Hertzberger’s objection merely restates an argument presented to and decided by the magistrate judge, the Court

reviews the R&R for clear error. *See Montgomery*, 98 F.Supp.3d at 1017. Having carefully performed this review, the Court finds no clear error and adopts the R&R.

ORDER

Based on the foregoing analysis and all the files, records and proceedings herein, **IT IS HEREBY ORDERED:**

1. Petitioner Robert Hertzberger's objection to the March 23, 2023 R&R, (Dkt. 17), is **OVERRULED**;
 2. The March 23, 2023 R&R, (Dkt. 16), is **ADOPTED**;
 3. Hertzberger's Petition for a Writ of Habeas Corpus, (Dkt. 1), is **DENIED**;
- and
4. This action is **DISMISSED without prejudice**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 28, 2023

s/Wilhelmina M. Wright
Wilhelmina M. Wright
United States District Judge